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No.

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Supreme Court of the United States

October Term, 1988

SANFORD J. BERGER
Petitioner

— vs. —

THE SUPREME COURT OF OHIO, et al.
Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. During an election campaign, does a Canon of the Ohio Supreme Court's Code of Judicial Conduct violate the First Amendment when it permits disciplinary sanctions against judicial candidates, who criticize their opponent or unintentionally make a misstatement of fact, without a requirement that such criticisms or misstatements be made with "actual malice" as established by this Court in New York Times Co. v. Sullivan, 376 U.S. 255 (1964)?

2. Does such Canon constitute "content based" discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment when it permits the sanctioning of judicial candidates for criticisms or misstatements without "actual malice," while all others who criticize or make unintentional misstatements during an election campaign are protected by such "actual malice" standard?

3. Is a Section 1983 plaintiff, whose corol-

lary claim that he is entitled to an award of attorney fees under a "catalyst" theory has not been disproved, entitled to an evidentiary hearing on the basis of his being a putative owner of a benefit (an award of attorney fees) who must be afforded an opportunity to prove his entitlement by virtue of Perry v. Sindermann, 408 U.S. 593 (1972)?

4. Can a Section 1983 plaintiff who obtains actual benefits for himself and his proposed class as a direct result of a judicial opinion resulting from his lawsuit (but which opinion does not grant formal judicial relief) be considered a "prevailing party" entitled to an award of attorney fees?

PARTIES

From the outset of these proceedings, Sanford J. Berger has been the plaintiff and appellant, while The Supreme Court of Ohio, Angelo Gagliardo (Disciplinary Counsel), the Board of Commissioners on Grievances and Discipline of the Judiciary of The Supreme Court of Ohio, and the State of Ohio have been the defendants and appellees.

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Supreme Court of the United States

October Term, 1988

SANFORD J. BERGER

Petitioner

- vs -

THE SUPREME COURT OF OHIO,et al.

Respondents

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For the Sixth Circuit

Sanford J. Berger petitions for a writ of certiorari to review an order of the United States Court of Appeals for the Sixth Circuit denying a petition for rehearing en banc, entered on January 24, 1989 in Case No. 87-3935, regarding a judgment entered by said Court of Appeals on October 31, 1988 which approved an order of the United States District Court for the Southern District of Ohio.

OPINIONS BELOW

The decision of the court of appeals denying rehearing en banc on January 24, 1989 appears at A1-2 infra. The dissent to such denial for rehearing en banc, entered on February 14, 1989, appears at A3-8 infra. The decision of the court of appeals entered on October 31, 1988 appears at A9-20 infra. The August 3, 1987 order of the district court appears at A21-33 infra. The prior order of the district court entered on September 14, 1984 appears at A35-54 infra, and is reported at 598 F. Supp. 69 (1984).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to §1254(1). The opinion below was entered on January 24, 1989.

CONSTITUTIONAL AND OHIO JUDICIAL CODE PROVISIONS INVOLVED

The **First Amendment** to the United States Constitution states, in pertinent part:

> Congress shall make no law respecting an establishment of religion, ..., or

abridging the freedom of speech, ...

The **Fourteenth Amendment** to the United States Constitution states, in pertinent part:

> No state shall make or enforce any law which abridges the privileges or immunities of citizens of the United States; ..., nor deny to any person within its jurisdiction the equal protection of the laws.

Canon 7(B)(1)(c) of the Code of Judicial Conduct, promulgated by the Supreme Court of Ohio, states, in pertinent part:

> B. Campaign Conduct
> (1) A candidate, including an incumbent judge, for a judicial office:
> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

STATEMENT OF THE CASE

In early 1984, the Petitioner (Berger) had been a practicing attorney in Cuyahoga County, Ohio for 32 years with extensive experience in, and a critic of, the county Domestic Relations Court. At that time, the

minority County Republican Party asked Berger to run for Domestic Relations judge against the incumbent Democrat; but it was precarious for a Republican to run and possibly offend a Democratic incumbent judge due to the Disciplinary Counsel of the 6-1 Democrat controlled Ohio Supreme Court bringing questionable disciplinary charges against the alleged offender. A41-44. A55 editorially describes the prevailing partisan attitude of the Ohio Supreme Court in 1984. Discipinary Counsel justified his disciplinary charges on the basis of Canon 7(B)(1)(c), which he interpreted to mean that all a candidate was allowed to state was his name, rank and serial number.

Whereas Berger knew his opponent better than any endorsing newspaper or group, he found that he, as well as all other Republican judicial candidates, were inflicted with "judicial lockjaw" from the outset of their judicial campaigns, and whereas the

media and anyone else could freely criticize judicial candidates, he and all other candidates had been judicially "gagged." Because of Disciplinary Counsel's prior actions, Berger had a fear that if he tried to speak with the electorate, he would be subjected to disciplinary action - which fear was later found to be reasonable by federal district court Judge Robert Duncan. A44, infra.

Accordingly, on June 11, 1984, Berger filed a class action complaint against the Supreme Court of Ohio and its Disciplinary Counsel; asking for declaratory and injunctive relief, and contending that the subject Canon was violative of the First Amendment and the Equal Protection Clause. A hearing on his Motion For A Preliminary Injunction was held soon afterwards before federal district judge Robert Duncan, with his Order following on September 14, 1984. A34-54. Although Judge Duncan's Opinion denied formal injunctive relief, he said something therein that had

never been said before regarding Ohio judicial campaigns and the subject Canon:

> The Court is not persuaded that this provision prohibits criticisms of judicial administrations and incumbents, assuming such criticisms are not untruthful, or misleading. A49-50, infra.

Those words were immediately seized upon by the Ohio Republican Party (after conferring with Berger) and the previously timid campaigns of the two Republican challengers for seats on the Ohio Supreme Court took a 180 degree turn by becoming highly critical of the Ohio Supreme Court, and their campaigns were successful. So too, in 1986, the Democratic Chief Justice was defeated by the Republican challenger using the same hard-hitting tactics.

On January 15, 1985, Berger filed his Motions For Declaratory Judgment and For Attorney Fees. The Respondents responded and also filed a Motion For Summary Judgment; but before all of these motions could be ruled upon, Judge Duncan resigned, and a new judge,

the Hon. James Graham, was not appointed and assigned to the case until much later in time.

On August 3, 1987 (nearly 3 years after Judge Duncan's Opinion and the occurence of a multitude of pertinent changes in the interim: such as, a Republican majority Ohio Supreme Court and the forced resignation of Disciplinary Counsel), Judge Graham granted the Respondents' Motion For Summary Judgment. A21-33, infra. He accepted Judge Duncan's reasoning, and held that Canon 7(B)(1)(c) was constitutional on its face because it did not prohibit criticisms by judicial candidates that were truthful and not misleading.

Judge Graham, without a hearing to update what had happened during the preceding 3 years, overruled Berger's motions, including his Motion For Attorney Fees, on the basis that he had not demonstrated any changes as a result of his lawsuit.

Berger then filed a Motion To Alter Or Amend Judgment pursuant to F.R.C.P. 59(e) on

August 13, 1987, contending that the Canon was unconstitutional because it permitted the punishment of judicial candidates for criticizing their opponents without requiring a showing of "actual malice," as established in New York Times v. Sullivan, 376 U.S. 255 (1964); and that he was not afforded an evidentiary hearing to show that during the preceding three years, the Respondents had changed their conduct (or threatened conduct) as a result of Judge Duncan's 1984 Opinion. That motion was also overruled by Judge Graham without a hearing.

On October 31, 1988, the Sixth Circuit Court of Appeals affirmed Judge Graham's judgment, but nowhere in their decision do they discuss the "actual malice" requirement of the New York Times case, even though it had been briefed and orally argued. A9-20.

Berger then filed a Petition For Rehearing En Banc, wherein he complained that the original panel did not address two of the

Issues presented to the court: namely, (1) That the New York Times "actual malice" standard be applied to the comments of Ohio judicial candidates, and (2) That an evidentiary hearing is required prior to the determination by a court as to whether or not a litigant's lawsuit has caused a defendant to alter his conduct based on the "catalyst" theory. Said Petition was then overruled by the Court of Appeals on January 24, 1989. A1-2, infra.

However, on February 14, 1989, one of the Sixth Circuit judges, Judge Merritt, filed a dissenting Opinion to the denial of the Petition For Rehearing En Banc. A3-8, infra. Therein, Judge Merritt argued that the Canon was overbroad; prohibited any misrepresentation of a fact, no matter how innocent; and, therefore, facially violated the First Amendment due to the absence of an "actual malice" requirement.

REASONS FOR GRANTING THE WRIT

I. THE FIRST AMENDMENT RIGHT OF A JUDICIAL CANDIDATE TO UNINHIBITEDLY SPEAK OUT, SO AS TO HAVE AN INFORMED ELECTORATE, OUTWEIGHS THE STATE'S INTEREST IN BEING SOLITIOUS ABOUT MAINTAINING THE SACROSANCT IMAGE OF ELECTED STATE JUDGES BY THE JUDICIAL IMPOSITION OF "CANDIDATE LOCKJAW" WITH SANCTIONS FOR VIOLATION.

This Court has held that a state's power to regulate elections does not extinguish its responsibility to observe First Amendment limitations. Tashjian v. Republican Party of Conecticut, 479 U.S. 208,217 (1986).

More recently, this Court set down the test to be applied in determining if a state law regulating elections violates the First Amendment. Eu v. San Francisco County Democratic Central Committee, ___U.S.___, 57 U.S.L.W. 4251 (1989). The first determination that must be made is whether the law burdens First Amendment rights. If so, then secondly,

it must be determined whether the law serves a compelling state interest, and is narrowly tailored to serve that interest. 57 U.S.L.W., at p.4253.

The "[d]ebate on qualifications of candidates [is] integral to the system of government established by our constitution." See Buckley v. Valeo, 424 U.S. 1,14 (1976).

In 1987 and 1988, the lower courts held that Canon 7(B)(1)(c) was not in violation of the First Amendment becuase it does not prohibit truthful and non-misleading criticisms by Ohio judicial candidates. However, this was the parroting of what Judge Duncan had said for the first time in 1984. But, both lower courts failed to consider that the Canon contains no "actual malice" requirement as established in New York Times v. Sullivan, supra, although that issue was presented to both lower courts.

This Court has held that the "actual malice" requirement applies to criminal stat-

utes that punish conduct during election campaigns. (But the ongoing threat of suspension and disbarment are also onerous punishments that can inhibit the free exercise of First Amendment rights by judicial candidates). Brown v. Hartlage, 456 U.S. 45 (1982), where the following was said at page 56:

> [the] chilling effect of such absolute accountability for factual misstatements is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns. (Citations omitted). Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount ...

The purpose of the "actual malice" requirement is to prevent a "chilling effect" on speech protected by the First Amendment. Hustler Magazine, Inc. v. Falwell, 485 U.S. ___,___, 108 S.Ct. 876,879 (1988).

There is a realistic danger that, in the absence of an "actual malice" requirement,

judicial candidates will refrain from criticizing their opponents rather than risk disciplinary charges being filed against them. Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947,956 (1984).

Consequently, Canon 7(B)(1)(c) burdens the First Amendment rights of Ohio judicial candidates -- especially those who are not running for Justice of the Ohio Supreme Court.

The Court of Appeals also held that the Canon should be construed so as to avoid the necessity of adjudicating the federal constitutional question. But, the Canon must be "readily susceptible" of a limited construction for the federal courts to apply it. See Virginia v. American Booksellers Association, ___U.S.___,___, 108 S.Ct. 636,644 (1988).

In contrast, Canon 7(C)(9), (A56,infra), prohibits judicial candidates from purposely posting, publishing, circulating or distributing a written or printed false statement either knowing the same to be false, or with

reckless disregard as to whether it was false or not -- which is the equivalent of the "actual malice" requirement. See Judge Merritt's comment at A6, infra.

Additionally, Disciplinary Rule 8-102 (A)and(B) of the Ohio Supreme Court's Code of Professional Responsibility, (A57,infra), prohibits an atorney from knowingly making a false statement of fact concerning the qualifications of a candidate for election or appointment to judicial office, and from knowingly making a false accusation against a judge or adjudicatory officer.

If the Ohio Supreme Court had intended to include the "actual malice" standard in Canon 7(B)(1)(c) and/or a requirement that the misrepresentation be "knowingly" made, it could have just as easily have been included therein, as it was in the above examples. As such, the Canon remains a constant threat to the exercise of uninhibited free speech by judicial candidates. It is the "loaded gun"

that can shoot down any judicial candidate, and it matters little whether the gun is in the hands of a Republican or Democratic Ohio Supreme Court.

In that respect, Judge Graham's 1987 Opinion held that Berger was no longer in danger of being sanctioned under the Canon due to the fact that since the filing of his 1984 action, there were now four new Justices elected to the Ohio Supreme Court, and that the Respondent Gagliardo is no longer the Disciplinary Counsel. A29, infra. Hindsight is grand, but the danger Berger faced in 1984 is hardly comparable to the latent situation that existed in 1987 -- and besides, what if Berger wants to run again, and the new Disciplinary Counsel doesn't like the idea of his talking too much or saying what he may personally consider to be wrong?

In answer, whether a statute may validly be personally applied to a party before the court, and others, it may nevertheless be so

overbroad that it "[m]ay inhibit the constitutionally protected speech of third parties." New York State Club Ass., Inc. v. New York City, __U.S.__,__, 108 S.Ct. 2225,2233 (1988); quoting from City Council v. Taxpayers for Vincent, 466 U.S. 789,798 (1984) -- which is the situation in the present case in that Berger might have been safe in 1987, but other present and future judicial candidates will still be inhibited from speaking freely due to the ever-present Canon. In that respect, it should be remembered that Berger brought his lawsuit as a class action seeking to represent all Ohio judicial candidates, but that certification was denied in 1987.

Moreover, judges are entitled to no more immunity from criticism than are other public officials. Landmark Communiciations, Inc. v. Virginia, 435 U.S. 829, 842 (1978), so there is no legitimate state interest justifying the absence of an "actual malice" requirement in the Canon.

As mentioned, Judge Graham's 1987 Opinion was based on Judge Duncan's 1984 Opinion, but the 1987 Opinion was rendered prior to this Court's decision in Brockett v. Spokane Arcades, Inc., 472 U.S. 491,503 (1985), which held that an overbroad statute can be held partially invalid. The Court of Appeals also validated the Canon on the basis that it was necessary to protect the dignity and integrity of the judiciary.

However, fraudulent misrepresentations of facts can be regulated, ... but the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable. Riley v. National Federation of the Blind of North Carolina, __U.S.__,__, 108 S.Ct. 2667, 2681 (1988) (Scalia, J., concurring in part and concurring in judgment).

Nor is the Canon narrowly tailored to serve the state's interest in protecting the dignity of the judiciary, since a less restrictive alternative - an "actual malice"

standard is available. Boos v. Barry, __U.S. __,__, 108 S.Ct. 1157,1168 (1988).

As Judge Merritt concluded at A7-8 of his dissenting Opinion, and after stating that the Canon was overbroad:

> Consideration of this case in light of the actual holdings of the Supreme Court on this matter leads me to the conclusion that the panel has understated the stringency of the review that we are mandated to exercise, misread the challenged regulation, and failed to notice a facial constitutional violation that cuts directly into the premier First Amendment interest - our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open [.] New York Times Co. v. Sullivan, 376 U.S. at 270.

What is foreboding is that there are 3 new Republican Justices on the Ohio Supreme Court who personally took advantage of Berger's work; knew the free speech oppressiveness of the Canon; and yet, the Canon remains unchanged.

II. IN A STATE JUDICIAL ELECTION, THE EQUAL PROTECTION CLAUSE IS VIOLATED WHEN THE ONLY INDIVIDUALS "GAGGED" BY THE STATE ARE THE JUDICIAL CANDIDATES THEMSELVES.

Both lower courts held that the Canon does not deny Equal Protection because there is a difference between elections for judicial officers and elections for legislative and executive officials. But, it is only judicial candidates who can be punished for misstatements of fact without the necessity of a showing of "actual malice," while everyone else who comments on a judicial contest has the protection of the "actual malice" test.

As such, the Canon contains "content based" discrimination of speech by judicial candidates in violation of the Equal Protection Clause. Carey v. Brown, 447 U.S. 455 (1980) and Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

Additionally, First Amendment rights

constitute fundamental constitutional rights. Shelton v. Tucker, 364 U.S. 479,488 (1960).

In Equal Protection cases concerning fundamental constitutional rights, as herein, strict judicial scrutiny (rather than the rational relationship test) is applicable. Clark v. Jeter, __U.S.__,__, 108 S.Ct. 1910, 1914 (1988) and Harper v. Virginia Board of Elections, 383 U.S. 663,672 (1966).

A comparison of the challenged Canon with Canon 7(C)(9), (A56,infra), and Disciplinary Rules 8-102(A)and(B), (A57,infra), will reveal that the objectionable Canon cannot pass the strict scrutiny test due to its restrictive prohibitions.

In essence, the ones who know the most are the ones who can say the least!

III. A SECTION 1983 PLAINTIFF, WHOSE "CATALYST" CLAIM HAS NOT BEEN DISPROVED, IS THE PUTATIVE OWNER OF A COROLLARY SECTION 1988 BENEFIT, AND MUST BE AFFORDED AN EVIDENTIARY HEARING TO PROVE HIS ENTITLEMENT THERETO.

Judge Graham's Opinion was dated Aug. 3, 1987; nearly 3 years after Judge Duncan's precedent 1984 Opinion. The changes that Judge Duncan's Opinion precipitated during those 3 years were well known to any political observer, but Berger's Motion For Attorney Fees lay dormant from Jan. 15, 1985 until he was surprised by Judge Graham's Opinion. At no time was Berger afforded the opportunity, by documentation or hearing, to present any evidence as to the changes that evolved as a proximate result of his lawsuit.

This Court has never determined when a plaintiff, claiming that he is a "prevailing party" on a "catalyst" theory is entitled to an evidentiary hearing on his Section 1988

Motion For Attorney Fees. Yet, this Court has held that a putative owner of a benefit must be provided with an opportunity to prove his entitlement. Perry v. Sindermann, 408 U.S. 593,603 (1972).

Herein, both lower courts found that Berger had not demonstrated a change in the conduct, or threatened conduct, of any of the defendants as a direct result of his lawsuit. Nice, but it's rather difficult to demonstrate anything without being afforded the opportunity.

A plaintiff can be considered as a "prevailing party" entitled to an award of attorney fees even when he does not obtain formal judicial relief if his lawsuit caused the defendant to change his conduct or threatened conduct towards the plaintiff. Hewitt v. Helms, 482 U.S.__,__, 107 S.Ct. 2672,2676 (1987).

Additionally, the determination of an award of attorney fees is collateral to, and

separte from, the decision on the merits of a plaintiff's causes of action. White v. New Hampshire Department of Employment Security, 455 U.S. 445,451 (1982) and Budinich v. Becton Dickinson and Co., __U.S.__,__, 108 S.Ct. 1717,1721 (1988).

Accordingly, Judge Graham's 1987 Order granting the Respondents' Motion For Summary Judgment on the merits of Berger's claims for relief cannot conclusively bar him from an evidentiary hearing on the collateral issue as to whether or not his lawsuit served as a "catalyst" that caused a change of conduct or threatened conduct of any of the Respondents herein -- when that issue was hotly contested in the pleadings before Judge Graham.

As in a Motion For Summary Judgment, the Respondents had the burden of showing that there was no genuine issue of fact as to Berger's claim that his action acted as a "catalyst." Celotex Corp. v. Catrett, 477 U.S. 317,323 (1986). The Respondents failed

to sustain that burden, and even Judge Graham admitted at A29 that "Gagliardo is no longer disciplinary counsel."

Therefore, the issue as to whether or not Berger's action was the proximate cause of forbearance on the part of the Respondents as a result of Judge Duncan's Opinion was "intensely factual," infra, and even though the court of appeals affirmed Judge Graham's denial of Berger's Motion For Attorney Fees without addressing the presented issue as to whether or not an evidentiary hearing must be afforded the putative owner of a claimed benefit, nevertheless their avoidance of the issue does not negate the recent position of the Fifth Circuit in Savidge v. Fincannon, 836 F.2d 898,905 (1988), which held that the trial court erred in deciding the "intensely factual" issue of causation without an evidentiary hearing.

IV. HAVING EFFECTIVELY OBTAINED ACTUAL BENEFITS FOR HIMSELF AND THE CLASS HE SOUGHT TO REPRESENT BY JUDICIAL FIAT, A SECTION 1983 PLAINTIFF IS A "PREVAILING PARTY" ENTITLED TO AN AWARD OF ATTORNEY FEES EVEN THOUGH HE DID NOT OBTAIN FORMAL JUDICIAL RELIEF.

At A43-44 of Judge Duncan's Opinion, he unequivocally states that:

> Disciplinary Counsel is the individual charged with investigating and prosecuting judicial candiates for violations of the Code of Judicial Conduct; there has been a public manifestation, which defendant Gagliardo has not disavowed, of his belief that any criticism of an incumbent judge in the course of a judicial campaign is a violation of the Supreme Court's rules of judicial conduct; this understanding of the Judicial Code has been reiterated by Disciplinary Counsel in pleadings filed with the Supreme Court of Ohio in Souers; and Disciplinary Counsel has demonstrated a readiness to initiate prosecution of judicial candidates whose conduct he considers to be inconsistent with such a view of the Judicial Code. Given these circumstances, it is fallacious to conclude that as a candidate for judicial office plaintiff faces merely an 'imaginary' threat of prosecution should he follow through with his announced intention to voice various criticisms of the incumbent. To the contrary, his fear of prosecution appears to be quite

reasonable.

Then later, at A49-50, Judge Duncan's precedent statement that judicial candidates (contrary to Disciplinary Counsel's position) could criticize their opponents.

As such, Judge Duncan's words served as a "red flag warning" to Disciplinary Counsel not to institute any disciplinary charges against judicial candidates who criticized their opponents, provided such criticisms were truthful and not misleading.

Consequently, this was the injunctive relief that Berger had originally sought, albeit that it was given in a left-handed manner. See First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns, 47 Ohio State Law Journal 201,205 (1986), Elizabeth I. Kiovsky. Also, the lead newspaper editorial at A55.

Berger also obtained his requested declaratory relief, albeit left-handedly, when Judge Duncan cured the judicially in-

flicted "lockjaw" that had previously handicapped all Ohio judicial candidates by permitting them to open their mouths for the first time in Ohio history.

In Rhodes v. Stewart, __U.S.__,__, 109 S.Ct. 202,203 (1988), which was summarily decided after the court of appeals decision herein, it was held that two individual plaintiffs were not "prevailing parties" entitled to an award of attorney fees despite their having obtained a declaratory judgment because they did not obtain any actual benefits from such judgment.

Also, in Hewitt v. Helms, supra, it was held that a statement of law in a judicial opinion was not the equivalent of a declaratory judgment, because the plaintiff did not obtain any actual benefits from such statement of law since the defendants were found to be entitled to qualified immunity.

Therefore, it is the receipt of actual benefits, rather than the mere obtaining of

formal judicial relief, that is the keystone in determining whether or not a plaintiff is a "prevailing party" entitled to an award of attorney fees.

In actuality then, Berger did, in fact, obtain actual relief for himself and the members of the class he sought to represent, even though he did not obtain formal judicial relief. See our Loudermill v. Cleveland Board of Education, 844 F.2d 304,313 (C.A.6,1988), cert. den'd, __U.S.__, 109 S.Ct. 377 (1988), as he obtained nearly all the actual benefits he sought in originally bringing his action.

In Hensley v. Eckerhart, 461 U.S. 424 (1983), this Court approved the definition of a "prevailing party" established in Nadeau v. Helgome, 581 F.2d 275,278 (C.A.1,1978); i.e., if the plaintiff "succeeds on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit." (Emphasis)

Berger's action sufficiently opened the

First Amendment door that had been previously nailed shut by the Respondents, and thereby acually benefitted himself and the proposed members of his class by correcting their "lockjaw" predicaments. He also prevailed on a significant issue when Judge Duncan placed himself in the open doorway and implicitly defied the Respondents to once again try to nail that First Amendment door shut.

It is the omnipresence of Judge Duncan's Opinion that keeps that First Amendment door ajar in Ohio, and Berger now asks that this Court fully swing open that door for all Ohio judicial candidates.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be looked upon favorably.

Respectfully submitted,

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NO. 87-3935

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANFORD BERGER	()	
Plaintiff-Appellant	()	
- vs -	()	ORDER
THE SUPREME COURT OF OHIO, ET AL.	()	
Defendants-Appellees	()	

BEFORE: JONES and RYAN, Circuit Judges; and HULL*, Chief Judge United States District Court

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the

petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

FILED
JAN 24, 1989
LEONARD GREEN, Clerk

*Hon. Thomas G. Hull sitting by designation from the Eastern District of Tennessee

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
FEB 14 1989
LEONARD GREEN, Clerk

No. 87-3935

BERGER v. SUPREME COURT OF OHIO

MERRITT, Circuit Judge, dissenting from a denial of en banc review.

I respectfully dissent from this Court's refusal to reconsider en banc the First Amendment issue in this case.

Petitioner Sanford J. Berger has made a facial First Amendment challenge to a provision of the Ohio Code of Judicial Conduct limiting the speech of candidates for state judgeships. The provision reads as follows:

> (1) A candidate, including an incumbent judge, for a judicial office:
> . . . . . .
> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misprepresent his identity, qualifications, present position, or other fact.

Code of Judicial Conduct of Ohio Supreme Court, Canon 7(B)(1)(c).

Berger evidently wished to state his views, make pledges about reforms he would institute if elected, and criticize the then current administration of the state Domestic Relations Court.

Because he feared punitive application of Canon 7(B)(1)(c) to him if he spoke out as he wished, he sought a preliminary injunction barring application of the Canon to him. He lost in that bid, both before the District Court and on appeal.

Canon 7(B)(1)(c) is an extremely far-reaching prohibition on the political speech of candidates for state judicial office. It bars candidates from announcing their "views on disputed or political issues," taking within its sweep virtually any statement about the state's political life that would be relevant to voters in their effort to distinguish between candidates. Even more, it bars candidates from misrepresenting, even by an innocent mistake, any "fact."

Such a broad-ranging prohibition on political speech runs directly afoul of decisive Supreme Court precedent. First, the speech of political candidates has repeatedly been held to lie at the core of the values protected by the First Amendment.

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by the Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476,484 (1957) ... As the Court observed in Monitor Patriot Co. v. Roy, 401 U.S. 265,272 (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'

Buckley v. Valeo, 424 U.S. 1,14-15 (1976).

Second, the Supreme Court has set its highest standard of review for state regulation of the speech of political candidates:

> When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate

> state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.

Brown v. Hartlage, 456 U.S. 45,53-54 (1982).

The panel opinion in the present case does not cite any First Amendment precedent or apply the proper standard. In particular, it misses the significant overbreadth problem posed by the Ohio Canon. The panel adopts the District Court's reading that the Canon "does not prohibit criticisms of judicial administrations, or incumbents which are untruthful or misleading." Berger v. Ohio Supreme Court, No. 87-3935, slip op. at 4 (6th Cir. Oct. 31, 1988). That reading is clearly incorrect. Canon 7(C)(9) is explicitly limited to knowing or reckless falsehoods, but that is not the Canon which is under challenge. Canon 7(B)(1)(c), which is the subject of this litigation, explicitly prohibits the misrepresentation of any "other fact." The Supreme Court was faced with a

campaign regulation that did just that in Brown v. Hartlage, and there it said:

> The chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns.

Brown v. Hartlage, 456 U.S. at 61. The Supreme Court suggested that, in that context, it would adopt the standard articulated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and allow regulation only of misstatements knowingly or recklessly made. Brown v. Hartlage, 456 U.S. at 61-62.

Consideration of this case in light of the actual holdings of the Supreme Court on this matter leads me to the conclusion that the panel has underestimated the stringency of the review that we are mandated to exercise, misread the challenged regulation, and failed to notice a facial constitutional violation that cuts directly into the premier First Amendment interst -- our "profound national

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]" New York Times Co. v. Sullivan, 376 U.S. at 270.

FILED
OCT 31 1988
LEONARD GREEN, Clerk

No. 87-3935

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANFORD BERGER Plaintiff-Appellant - vs - THE SUPREME COURT OF OHIO, ET AL. Defendants-Appellees	( ) ( ) ( ) ( ) ( ) ( ) ( ) ( )	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: JONES and RYAN, Circuit Judges; and HULL, Chief District Judge.*

Per Curiam. Sanford J. Berger, the plaintiff-appellant, filed this suit on June 11, 1984, in the United States District Court for the Southern District of Ohio, seeking preliminary and permanent injunctive relief and a declaratory judgment holding Canon 7(B)(1)(c) of the Ohio Code of Judicial Conduct ("Canon 7 B(1)(c)" or "the Canon") unconstitutional. The dustrict court denied Berger's motion for preliminary injunctive relief on

September 14, 1984, Berger v. The Supreme Court of Ohio et al., 598 F. Supp. 69 (S.D. Ohio 1984) ("Berger I"), and granted summary judgment in favor of all the defendants on August 3, 1987, Berger v. The Ohio Supreme Court of Ohio et al., No. C2-84-1227, slip op. (S.D. Ohio Aug.3,1987) ("Berger II"). On August 13, 1987, Berger filed a motion for a new trial or, in the alternative, to alter or amend the judgment. When this motion was denied, Berger timely filed his notice of appeal to this court.

Upon consideration, we find no reason to disturb the district court's judgment and hereby affirm.

I.

In 1984, when this lawsuit was filed, Berger was a candidate for the office of Judge of the Cuyahoga County Court of Common Pleas, Division of Domestic Relations. As a part of his campaign, Berger wished to publicly discuss his views, make certain pledges

and promises regarding reform of practices of the office he sought, and publicly criticize what he preceived to be deficiencies in the administration of the Domestic Relations Court. See Berger I, 598 F. Supp. at 72. However, because Berger believed that such comments were prohibited by Canon 7(B)(1)(c), he filed a lawsuit seeking a preliminary injunction preventing the enforcement of Canon 7(B)(1)(c)'s provisions against him. Berger named as defendants the Supreme Court of Ohio, its Chief Justice and Justices, Angelo Gagliardo, Disciplinary Counsel to the Supreme Court of Ohio, and the Board of Commissioners on Grievances and Discipline of the Judiciary.

The district court held that Berger was not entitled to a preliminary injunction since he had not shown he was likely to succeed on the merits of his case, i.e., he was not likely to show that Canon 7(B)(1)(c) was unconstitutional. In granting final summary

judgment in favor of the defendants, the district court concurred in the reasoning of its earlier decision, holding that the Canon could be interpreted so as to avoid constitutional infirmities under the first and fourteenth amendments to the United States Constitution. The district court also denied Berger's motion for attorney fees, holding that he was not a "prevailing party" within the meaning of 42 U.S.C. § 1988 (1982). Berger appeals the district court's summary judgment in favor of the defendants as well as the denial of his request for attorney fees.

II.

The focus of this appeal is Canon 7(B)(1)(c) which provides:

> (1) A candidate, including an incumbent judge, for a judicial office:
>
> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

A candidate who violates this Canon is subject to disciplinary proceedings under the Rules for the Government of the Judiciary of Ohio.

Berger claims that the Canon impermissibly infringes upon a judicial candidate's first amendment rights to free speech. He further claims that the Canon violates his right to equal protection under the fourteenth amendment because it applies only to candidates for judicial office. Finally, Berger argues that the Canon is void for vagueness. We reject each of these contentions.

A.

When the constitutional validity of a statute is drawn in question, it is a cardinal principle that federal courts should first determine whether a reasonable construction of the statute may avoid the constitutional question. See Ashwander v. TVA, 297 U.S. 288,348 (1936)(Brandeis, J. concurring). When the constitutionality of state

statutes has been questioned, this court has noted that "state legislatures are presumed by federal courts to have acted constitutionally in making laws." Hartford Fire Ins. Co. v. Lawrence,Dykes,Goodenberger,Bower & Clancy 740 F.2d 1362,1366 (6th Cir.1984). Therefore, state statutes which have not been authoritatively construed by state courts should be interpreted by federal courts so as to avoid constitutional questions. See Dale Baker Oldsmobile v. Fiat Motors of North America, Inc., 794 F.2d 213,221 (6th Cir.1984). Although the instant case involves a constitutional challenge to a judicially enacted disciplinary rule, rather than a legislative provision, the same principles which guide our interpretation of state statutes are applicable herein. Compare Middlsex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (applying traditional abstention doctrine where the constitutionality of a judicially enacted disciplinary rule is challenged).

Applying this analysis to Canon 7(B)(1)(c), which has not been authoritatively construed by the Ohio Supreme Court, we conclude that the Canon is not facially violative of the first amendment. On its face, the Canon does not infringe upon a candidate's first amendment right to free speech because it "does not prohibit criticisms of judicial administrations or incumbents which are not untruthful or misleading." Berger II, slip op. at 4. Rather, as the district court noted, "the rule recognizes that judges are frequently called to adjudicate cases squarely presenting social and political issues," and seeks to protect the state's compelling interest in ensuring judicial integrity and impartiality. Id. at 4-5. Since the Canon does not prohibit a judicial candidate from running a truthful, upright and vigorous campaign, we hold that it does not violate the first amendment on its face.

For similar reasons, we find that the

Canon, as applied to Berger, does not violate the first amendment. As we noted earlier, Berger sought only to publicly discuss his views and make certain pledges and promises regarding reforms in the administration of the Domestic Relations Court. See Berger I, 598 F.Supp. at 72. None of these acts necessarily is prohibited by the Canon. Moreover, Berger has produced no evidence showing that he is in danger of being disciplined for engaging in these activities. Id. at 75; Berger II, slip op. at 2. Under these circumstances, Berger has not raised a genuine issue of material fact as to whether the Canon violates his first amendment rights.

B.

Berger next contends that the Canon violates the equal protection clause of the fourteenth amendment because it only applies to candidates for judicial office. Although the Canon does not single out judicial candidates for different treatment, we agree

with the district court that "[t]he very purpose of the judicial function makes inappropriate the same kind of particularized pledges and predetermined commitments that mark campaigns for legislative and executive office." Berger I, 598 F.Supp. at 76. See also Morial v. Judiciary Comm'n, 565 F.2d 295,304-306 (5th Cir.1977), cert. denied 435 U.S. 1013 (1978). Because the state's compelling interest in ensuring judicial integrity and impartiality justifies the special restrictions set forth in Canon 7B(1)(c), there is no material factual dispute concerning Berger's equal protection challenge and the defendants were entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

C.

Berger argues that Canon 7B(1)(c) violates the due process clause of the fourteenth amendment becuase it is void for vagueness. The test for determining whether an enactment is void for vagueness is whether the pro-

vision gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. Grayned v. City of Rockford, 408 U.S. 104,108-109 (1972). The Supreme Court has noted that "[t]he degreee of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and fair enforcement - depends in part on the nature of the enactment..." and has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. Id. at 498-99.

Upon consideration, we agree with the district court that Canon 7B(1)(c) is not impermissibly vague. Because the disciplinary sanctions attendant upon a violation of the Canon do not include criminal penalties, the stringent notice requirements that are applicable in the criminal context do not apply here. Moreover, while the language of the Canon certainly leaves room for interpreta-

tion, we find that the rule adequately notifies judicial candidates of what kinds of speech and/or conduct are proscribed. Therefore, we conclude that the district court properly disposed of Berger's vagueness challenge.

III.

Berger also contends that the district court abused its discretion in denying his request for attorney fees pursuant to 42 U.S.C. § 1988.

Under section 1988, only a "prevailing party" may recover attorney fees. The Supreme Court has stated that a "prevailing party" is one who "receive[s] at least some relief on the merits of his claim..." Hewitt v. Helms, 107 S.Ct. 2672,2675 (1987). "[A] favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not siffice to render him a "prevailing party" under section 1988. Id. at 2677. Although the plaintiff's relief need

not be judicially decreed to support a fee award under section 1988, the plaintiff must show that the defendant changed the behavior of which he complained, because of the lawsuit, to support an award. Id. at 2676.

In the case at bar, Berger obtained no judicially decreed relief on the merits of his claims. Moreover, as the district court found, Berger has not demonstrated that the defendants altered their conduct toward him because of this lawsuit. See Berger II, slip op. at 9. Under these circumstances, the district court correctly determined that Berger was not a "prevailing party" within the meaning of 42 U.S.C. § 1988.

IV.

For the above stated reasons, we hereby AFFIRM the judgment of the district court.

ISSUED AS MANDATE: February 1, 1989
COSTS: None

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*Honorable Thomas G. Hull, United States District Court for the Eastern Division of Tennessee, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Sanford J. Berger	Case No. C2-84-1227
Plaintiff	JUDGE GRAHAM
- vs -	
The Supreme Court of Ohio, et al.	*FILED: August 3, 1987*
Defendants	

MEMORANDUM AND ORDER

Several motions are pending bfore the court in the above case. The court will first consider the motion of defendants for summary judgment.

Summary judgment procedures are governed by Rule 56, Fed. R. Civ. P., which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.

Summary judgment will not lie if the dispute about a material fact is genuine. Anderson v. Liberty Lobby, Inc., 54 U.S.L.W. 4755, 4757 (June 25, 1986). However, summary judgment is appropriate if the opposing party

fails to make a showing sufficient to establish the existence of an element essential to that party's case. Celotex Corp. v. Catrett, 54 U.S.L.W. 4775,4777 (June 25, 1986).

The complaint herein, filed on June 11, 1984, is a suit under 42 U.S.C. §1983. Plaintiff at that time was a candidate for judicial office in Cuyahoga County, Ohio. The named defendants are the justices of the Ohio Supreme Court, the disciplinary counsel for the Ohio Supreme Court, the Board of Commissionerts on Grievance and Discipline of the Judiciary, the chairman and secretary of that Board and the governor of the State of Ohio.

The subject of plaintiff's suit is Canon 7B(1)(c) of the Code of Judicial Conduct, which provides:

> (1) A candidate, including an incumbent judge, for a judicial office:
>
> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

A candidate who violates Canon 7B is subject to disciplinary proceedings under Rules I and II of the Rules for the Government of the Judiciary.

Plaintiff's complaint alleges that Canon 7B(1)(c) impermissibly infringes upon a judicial candidate's First Amendment rights. Plaintiff further claims that the Canon violates the Equal Protection Clause of the Fourteenth Amendment in that non-judicial candidates are not subject to similar restrictions. Plaintiff additionally asserts in his supplemental brief in support of his motion for a preliminary injunction that the Canon is void for vagueness, thereby creating a danger of censorship through selective enforcement. Plaintiff requests injunctive and declaratory relief prohibiting enforcement of the canon and holding it to be unconstitutional on its face and as applied.

Plaintiff has indicated that as a candidate for the Domestic Relations bench of

Cuyahoga County, he would make pledges or promises to reform certain practices of the court relative to the management of cases, such as personal participation by the judge in the mediation of disputes. Plaintiff desires to criticize the excessive use of trial referees by the court. Plaintiff's Supplemental Brief, p. 5).

This court's predecessor, Judge Robert M. Duncan, had occasion to address plaintiff's claims in connection with plaintiff's motion for a preliminary injunction. Judge Duncan's opinion is now published in Berger v. Ohio Supreme Court of Ohio, 598 F.Supp. 69 (S.D. Ohio 1984). In denying plaintiff's motion for a preliminary injunction, Judge Duncan found that plaintiff had failed to establish that he was likely to succeed on the merits. This court agrees with Judge Duncan's wellreasoned analysis of plaintiff's claims and adopts that analysis as being equally appropriate to the resolution of the merits of the case.

Plaintiff has failed to demonstrate that Canon 7B(1)(c) is unconstitutional on its face or as applied to him. The Canon's prohibition against announcing views on legal or political issues does not prohibit critcisms of judicial administrations or incumbents which are not untruthful or misleading. See, In re Inquiry Relating to Baker, 218 Kan. 209, 542 P.2d 701 (1975); Matter of Riley, 691 P.2d 695 (Ariz. 1984). Rather, the rule recognizes that judges are frequently called to adjudicate cases squarely presenting social and political issues, and the state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest or person is entitled to the greatest respect. Morial v. Judiciary Commission of the State of Louisiana, 565 F.2d 295,302 (5th Cir. 1977).

The Canon further prohibits making pledges or promises of conduct in office other than the faithful and impartial performance of the

duties of the office. The Supreme Court has recognized that some knids of promises made by candidates to voters may be declared illegal without constitutional difficulty. Brown v. Hartlage, 456 U.S. 45 (1982). Judges cannot, consistent with the proper exercise of judicial powers, bind themselves to decide particular cases in order to achieve a given programmatic result. Morial, supra, at 305. It is a serious accusation to charge a judicial officer with making a politically motivated decision. Clements v. Fashing, 457 U.S. 957,968 (1982). In contrast, plaintiff desires to make statements concerning reforms he would institute in court procedures in the event of his election. Plaintiff's proposed promises relate to the faithful performance of the duties of judicial office and are expressly exempted from the scope of Canon 7B(1)(c).

The third provision in Canon 7B(1)(c) prohibits misrepresentations of a candidate's

identity, qualifications, present position or other fact. However, demonstrable falsehoods do not warrant the First Amendment protection applied to truthful statements. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Brown v. Hartlage, supra, at 60; In re Donohoe, 580 P.2d 1093 (Wash. 1978).

When a state seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment requires that the restriction be demonstrably supported by a compelling state interest. Brown v. Hartlage, supra, at 53. Nonetheless, it has long been recognized that the states have a compelling interest in regulating the activities of attorneys and judicial officers. See, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Clements v. Fashing, supra; Morial v. Judiciary Comm. of the State of Louisiana, supra. The State of Ohio has a compelling state interest in assuring that judicial campaigns are free of untruthful criticisms,

Statements or promises which impugn the integrity and impartiality of the state's judiciary. The interests of the state far outweigh any intrusion upon the First Amendment rights of judicial candidates occasioned by Canon 7B(1)(c).

This court further finds that Canon 7B(1)(c) is not unconstitutionally void for vagueness and the language of the provision is sufficiently clear that there is no impermissible risk of arbitrary enforcement. See, Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982).

Plaintiff has also failed to demonstrate that Canon 7B(1)(c), by singling out judicial candidates, violates the Equal Protection Clause. The judiciary is a separate branch under the Ohio Constitution, and a judge's duties are distinct from that of other elected or appointed officers. The state has a complelling interest in maintaining the fairness and neutrality of its judiciary in light

of the nature of the judicial function. These same considerations do not apply to candidates for legislative or executive office who, if elected, would be in a position to initiate sweeping legislative or policy changes, and who serve the special interests of their constituents.

As a matter of law, Canon 7B(1)(c) is constitutional on its face. Furthermore, plaintiff has not demonstrated that Canon 7 is unconstitutional as applied to him. As Judge Duncan noted in his decision, Berger v. Supreme Court of Ohio, supra, at 75, the Ohio Supreme Court has given no indication that it would interpret the Canon to mean anything more than it says on its face. Plaintiff has produced no evidence that he is in danger of prosecution under the Canon. In fact, the court takes notice that since the filing of this case, four new justices have been elected to the Ohio Supreme Court and defendant Gagliardo is no longer disciplinary counsel.

Plaintiff has submitted no evidence to indicate that any member of the current Ohio Supreme Court, disciplinary counsel or the Board of Commissioners espouses an interpretation of the Canon which would render its application unconstitutional. The court finds that no genuine issue of material fact exists in the present case, and that defendants are entitled to summary judgment.

Plaintiff has filed a motion for declaratory judgment to the effect that any disciplinary proceeding instituted against a judicial candidate for criticisms of his opponent or the court that are truthful and not misleading would constitute a violation of the First and Fourteenth Amendments. Plaintiff's motion is not well taken.

This court lacks jurisdiction to authoritatively construe state legislation. United States v. Thirty-seven Photographs, 402 U.S. 363,369 (1971). Ohio courts have the final authority to interpret that state's legisla-

tion. Brown v. Ohio, 432 U.S. 161 (1977). The Ohio courts have yet to address or interpret the provisions of Canon 7B(1)(c). In such a situation, this court's role is confined to examining the words of Canon 7b(1)(c) itself. Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). The court has found that the Canon is constitutional on its face and declines to speculate that Ohio courts in the future will engraft upon the rule some unconstitutional meaning.

Plaintiff's motion for certification as a class is moot in light of the court's ruling on defendant's motion for summary judgment.

Plaintiff has also moved for attorney fees under 42 U.S.C. §1988. Plaintiff claims that by reason of Judge Duncan's order, defendants were discouraged from instituting disciplinary proceedings against judicial candidates who criticized their opponents, and that therefore plaintiff achieved some of the benefits he sought in bringing the action.

Plaintiff asserts that he is therefore a "prevailing party" for purposes of an award of attorney fees under §1988.

A plaintiff must receive some relief on the merits of his claim before he can be said to prevail, whether such relief be in the form of a damage award, injunctive or declaratory relief, consent decree or settlement. Hewitt v. Helms, 55 U.S.L.W. 4907 (June 19, 1987). None of these forms of relief are present here. A favorable statement of law in an otherwise unfavorable opinion does not suffice to render the plaintiff a "prevailing party." Id. at 4910. Plaintiff has not demonstrated that the defendants in any way altered what otherwise would have been their conduct as to him. The fact that plaintiff initially overestimated the nature of the restrictions contained in Canon 7B(1)(c) and was later reassured by the court's opinion disagreeing with plaintiff's interpretation is not sufficient to grant plaintiff "pre-

vailing party" status.

Whereupon, it is hereby ordered that defendants' motion for summary judgment is GRANTED. Plaintiff's motions for declaratory judgment, certification of a class, and attorney's fees are DENIED. Judgment shall be entered for the defendants.

/s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

Date: August 3, 1987

United States District Court
S.D. Ohio, E.D.

Sept. 14, 1984

Sanford J. Berger, Plaintiff

v.

The SUPREME COURT OF OHIO, et al., Defendants

MEMORANDUM AND ORDER

DUNCAN, District Judge.

This matter is before the Court on plaintiff Sanford Berger's motion for a preliminary injunction preventing defendants from enforcing the provisions of Canon 7B(1)(c) of the Supreme Court of Ohio's Code of Judicial Conduct and Rules I and II of the Rules for the Government of the Judiciary of Ohio. Plaintiff claims that the above mentioned provisions deprive him of free speech in violation of the First and Fourteenth Amendments to the United States Constitution and of equal protection in violation of the Fourteenth Amendment. The court's findings of fact and conclusions of law follow hereinafter.

Defendants in this case are the Supreme Court of Ohio, its Chief Justice and Justices, Angelo Gagliardo, Disciplinary Counsel to the Supreme Court of Ohio, and the Board of Commissioners on Grievances and Discipline of the Judiciary. Defendant Supreme Court of Ohio is responsible for the governance of the bar of the State of Ohio including the disciplining of lawyers, judicial candidates, and judges, see Ohio Constitution Art. IV §5(B), and in pursuance of that duty has promulgated the Code of Judicial Conduct and Rules for the Government of the Judiciary of Ohio. Defendant Angelo Gagliardo is the Disciplinary Counsel of the Supreme Court of Ohio and is responsible for investigating and prosecuting disciplinary complaints against judicial candidates and judges in Ohio. Defendant Board of Comissioners on Grievances and Discipline of the Judiciary hears grievances against judges and judicial candidates and refers misconduct and determinations to the

Supreme Court for review and action.

Canon 7b(1)(c) of the Code of Judicial Conduct provides:

> (1) A candidate, including an incumbent judge, for a judicial office:...(c)should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; annopunce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

Rules I and II of the Rules for the Government of the Judiciary of Ohio provide for disciplinary action, including disbarment, against members of the bar who violate the rules of conduct of the Supreme Court of Ohio.

Plaintiff Berger is a candidate for the office of Judge of the Cuyahoga County Court of Common Pleas, Division of Domestic Relations, and as such has expressed a desire to publicly discuss his views, and make certain pledges and promises, regarding reform of practices in the office he seeks. More specifically, plaintiff has manifested a desire to publicly state as a judge in Cuya-

hoga County that he would "first attempt to have the parties who appear before him mediate their disputes, without the presence of their attorneys, in order to remove some of the adversary affects (sic) of the divorce system upon the litigants." See Plaintiff's Supplemental Brief in Support of His Motion for Preliminary Injunction. Plaintiff also desires to "criticize the excessive use of trial referees by the court and that he would hear most matters himself; or be able to criticize traditional dehumanizing procedures." Id. At the hearing on plaintiff's motion, plaintiff reiterated his desire to criticize what he perceives to be deficiencies in the current administration of domestic relations law in Cuyahoga County and to voice his views on needed reforms. Plaintiff also stated at the hearing that he would like to make publicly known his "philosophy" or "platform."

It is plaintiff's contention that Canon

7B(1)(c) not only prohibits judicial candidates from making public statements about pending cases, but also prohibits general criticisms of the incumbent and/or the administration of the court, and pledges regarding reform of judicial practices. Indeed, it appears to be plaintiff's view that pursuant to Canon 7B(1)(c) a candidate for judicial office may not publicly state anything other than that he will faithfully and impartially perform the duties of the office. See Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injuctions, p.2. Plaintiff asserts that such a restriction on speech violates his First and Fourteenth Amendment rights. Alternatively, plaintiff suggests that there are no ascertainable standards as to what constitutes a statement with regard to the "faithful and impartial performance of one's duties in office." Plaintiff maintains that the uncertain scope of the rule, in conjunction with the possible

penalties for violation thereof, has the effect of "chilling" his right of free speech. Therefore, plaintiff asserts, the rule should be declared unconstitutional on its face for vagueness. See Plaintiff's Supplemental Brief p. 5.

Finally, plaintiff contends that Canon 7 B(1)(c) denies him equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution because it arbitrarily and without sufficent justification, applies only to candidates for state judicial, as opposed to legislative and executive, positions.

As stated above, a hearing has been held to determine whether a preliminary injunction should issue.

Prior to turning to the question of whether injunctive relief is warranted, however, the Court feels compelled to examine two preliminary issues raised by defendants: first, whether plaintiff has standing to

bring suit, and second, whether the pendency of a related proceeding before the Supreme Court of Ohio warrants abstention in the case at bar.

Standing

In their memorandum in opposition to plaintiff's motion, defendants state that at present "no investigation of Plaintiff [by defendants for violation of a rule of conduct] is under way; in fact, defendants have not even received any complaints concerning Plaintiff." Defendants contend that until the state's investigative and enforcement powers are actually utilized, defendants have acted only in a legislative capacity, and are thereby immune from suit. See Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). Defendants add that as of yet plaintiff has not even outlined an anticipated course of conduct with sufficient clarity to create a potential case or controversy for the court, much less given defen-

dants cause to initiate an investigation. As a result, defendants assert that plaintiff lacks standing at this point to challenge defendants with regard to the constitutionality of Canon 7B(1)(c). The Court does not agree.

[1] Plaintiff has indeed outlined with relative specificity a prefrred course of conduct in running for judicial office and has clearly expressed a desire to make concrete criticisms of the incumbent and current administration. For example, plaintiff wishes to publicly criticize what he perceives to be the current administration's overuse of referees and to pledge to limit such use. Plaintiff has also voiced a need for the administration to encourage more parties to mediate their problems among themselves, without the presence of attorneys.

[2] Nor does it appear that the threat to plaintiff of prosecution under Canon 7B(1)(c) should he publicly issue the above statements is purely "imaginary or specula-

tive." In his supplemental brief, plaintiff notes an article from the Canto Repository which purports to quote defendant Gagliardo, in his capacity as Disciplinary Counsel, in connection with another disciplinary proceeding against a judicial candidate. Disciplinary Counsel v. Hon. Loren E. Souers, Jr., Case Number DD84-3, which also involves alleged violations of Canon 7B(1)(c), is currently pending before the Supreme Court of Ohio. The article states:

> He [Gagliardo] said even if Souers had been correct in all of his allegations, he still violated judicial canons that forbid candidates from challenging the records of incumbents. ... He said candidates should refer only to their background, awards they have received and endorsements from groups that support them.

See Plaintiff's Supplemental Brief, p.7 and Exhibit "C" to that Brief, an article from the Canton Repository. Defendant Gagliardo has not attempted, in the case at bar, to disavow those comments or object to their reported scope or context. In fact, such a viewpoint of

the scope of the Judicial Code of Conduct is reiterated in Disciplinary Counsel's Brief in Opposition to Respondent's Objections to the Findings of Fact which was filed in the Souers case. In that Brief, Disciplinary Counsel makes clear that in his view the Code of Judicial Conduct prohibits candidates for judicial office from making comments that are critical of the incumbent, regardless of the truth or falsity of those allegations. To summarize, Disciplinary Counsel is the individual charged with investigating and prosecuting judicial candidates for violations of the Code of Judicial Conduct; there has been a public manifestation, which defendant Gagliardo has not disavowed, of his belief that any criticism of an incumbent judge in the course of a judicial campaign is a violation of the Supreme Court's rules of judicial conduct; this understanding of the Judicial Code has been reiterated by Disciplinary Counsel in pleadings filed with the Supreme Court of Ohio in Souers; and Dis-

ciplinary Counsel has demonstrated a readiness to initiate prosecution of judicial candidates whose conduct he considers to be inconsistent with such a view of the Judicial Code. Given these circumstances, it is fallacious to conclude that as a candidate for judicial office plaintiff faces merely an "imaginary" threat of prosecution should he follow through with his announced intention to voice various criticisms of the incumbent. To the contrary, his fear of prosecution appears to be quite reasonable. Plaintiff need not expose himself to actual prosecution to present a justiciable controversy to this Court; the threat of prosecution is enough. See Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) and Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). Preconduct challenges to the validity of laws burdening First Amendment rights are among the essential bulwarks of a system of free expression. Morial v. Judiciary Commission of State

of LA, 565 F.2d 295,298 (5th Cir. 1977).

[3] Additionally, defendants are not in this case shielded from suit by legislative immunity. Plaintiff seeks declaratory and injunctive relief from the threat of impending investigation, prosecution and perhaps, sanction. Defendants are before the Court not in any legislative capacity, but in their capacity as investigators and enforcers. In such a capacity, legislative immunity does not apply. See Supreme Court of Virginia v. Consumer's Union, supra.

It is, therefore, the Court's opinion that plaintiff has standing to bring suit in this case.

Abstention

Defendants have also brought the Souers case to the Court's attention. Souers involves, among other things, alleged violations of Canon 7B(1)(c), and the respondent in that case has raised First Amendment defenses. Defendants contend that the pendency of the

Souers case warrants abstention by this Court in the case at bar, under the Pullman doctrine, see Railroad Commission of Texas v. Pullman Co 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed.2d 971 (1941), since the Supreme Court of Ohio in Souers might interpret Canon 7B(1)(c) in such a manner as to render unnecessary or substantially modify the federal constitutional questions presented in the case at bar.

[4] It is the Court's belief that abstention is not, under the circumstances at hand, appropriate. The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather invovles a discetionary exercise of a court's equity powers. Baggett v. Bullitt, 377 U.S. 360,375, 84 S.Ct. 1316,1324, 12 L.Ed.2d 377 (1964). Although most of the issues posed by plaintiff are extant in Souers significant dissimilarities exist. Plaintiff has questioned the meaning of the language "pledges and promises of conduct in office

other than the faithful and impartial performance of the duties of the office." The meaning and constitutionality of this provision does not appear to be before the Supreme Court of Ohio in Souers, and it is, therefore, unlikely that the court in that case will resolve all of plaintiff's constitutional concerns herein.

[5] Due to the imminency of the upcoming election, and plaintiff's desire to obtain some resolution of his concerns in time to campaign accordingly, the Court is reluctant to delay for an undue or indeterminate length of time consideration of plaintiff's request for a preliminary injunction. Such a delay may be quite costly where the vagueness of a state rule or statute may inhibit the exercise of First Amendment freedoms. Therefore, the Court declines to abstain on the consideration of plaintiff's request for a preliminary injunction against the enforcement of Canon 7b(1)(c) and Rules I and II.

Preliminary Injunctive Relief

To obtain preliminary injunctive relief plaintiff must show (1) a strong or substantial likelihood of success on the merits; (2) irreparable injury; (3) that the issuance of a preliminary injunction would not cause substantial harm to others; and (4) that the public interest would be served by issuing a preliminary injunction. Mason County Medical Assn. v. Knebel, 563 F.2d 256,261 (6th Cir. 1977). No single factor is necessarily dispositive; proper judgment entails a balancing of all elements involved.

Likelihood of Success on the Merits

[6,7] Plaintiff's first obligation is to convince the Court of a substantial likelihood of his success on the merits. Plaintiff contends that the enforcement of Canon 7B(1)(c) deprives him of his First and Fourteenth Amendment rights to freedom of speech. Plaintiff correctly states that although defendants have a duty to regulate the conduct of the bar,

as such regulations move closer to impairing First Amendment rights, they must withstand a higher level of scrutiny to pass constitutional muster. Morial v. Judiciary Commission, supra, 565 F.2d at 300. When a regulation does run afoul of the First Amendment in a significant or substantial manner, then courts are obliged to invoke strict constitutional scrutiny. Under such a test, the state must show a compelling interest, to be achieved by means that are closely drawn to avoid any unnecessary abridgement. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).

[8] Canon 7B(1)(c) contains three prohibitions: (1) announcing views on disputed legal or political issues, (2) making pledges or promises of conduct in office other than the faithful and impartial performance of duties in office, and (3) misrepresenting one's identity, qualifications, present position, or other fact. The Court is not persuaded that

this provision prohibits criticisms of judicial administrations and incumbents, assuming such criticisms are not untruthful or misleading. See the Supreme Court of Kansas' analysis of this issue in In re Inquiry Relating to Baker, 218 Kan. 209, 542 P.2d 701 (1975). There is evidence in the record to suggest that defendant Disciplinary Counsel maintains an opinion to the contrary; however, Disciplinary Counsel's position on the issue is simply irrelevant for purposes of this Court's inquiry into the constitutionality of Canon 7B(1)(c) - it is the province of the Supreme Court of Ohio, not Disciplinary Counsel, to authoritatively interpret and enforce the Ohio Code of Judicial Conduct. As of now, the Supreme Court of Ohio has not given this Court reason to believe that the Canon means anything more than what it says on its face.

[9,10] Nor is the Court convinced of the substantial likelihood of success of plaintiff's restrictive reading of the provision

regarding pledges and promises. One of the purposes of Canon 7B(1)(c) is to prohibit candidates for judicial office from making pledges or promises which appeal to prejudices or special interests. Plaintiff Berger intends to pledge, among other things, to increase the judge's personal involvement in the administration and resolution of cases, and to attempt to encourage more direct dispute resolution among the parties themselves. Pledges such as these, the Court believes, relate to the faithful performance of the duties of judicial office, and are therefore expressly exempted from the scope of Canon 7B(1)(c). Id. Finally, plaintiff has not convinced the Court of the existence of a substantial likelihood that the intent and meaning of the provision regarding campaign pledges is so unclear as to render it properly subject to facial attack as unconstitutionally void for vagueness. See CSC v. Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).

[11] The Court believes that even under a standard of strict scutiny, the state's regulation is necessary to achieve a compelling state interest. Plaintiff does not dispute that the state has a compelling interest in assuring that its elected judges are protected from untruthful criticism and that judicial campaigns are run in a manner so as not to damage the actual and perceived integrity of state judges and the bar; hence, the provision against misrepresentation. Additionally:

> Ours is an era in which members of the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political issues. The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect.

Morial, 565 F.2d at 302. Hence, the prohibitions against announcing predetermined views on disputed legal or political issues, and against making pledges of conduct other than those relating to the faithful and impartial performance of duties in office. The Court

finds that plaintiff has not demonstrated a substantial likelihood that these interests are outweighed by whatever intrusion on the First Amendment is caused by prohibiting judicial candidates from making misleading or fallacious statements or political pledges.

[12] The Court also is not persuaded by plaintiff in this case that the singling out of judge's campaign conduct vilates the equal protection clause of the Fourteenth Amendment. The very purpose of the judicial function makes inappropriate the same kind of particularized pledges and predetermined commitments that mark campaigns for legislative and executive office. A judge acts on individual cases, not broad programs. Canon 7B(1)(c) appears to appropriately recognize this distinction between candidates for judicial and for executive and legislative office. In short, plaintiff has not demonstrated a substantial likelihood that the Canon denies judicial candidates equal protection under the Fourteenth

[13] The Court finds that plaintiff has not persuasively demonstrated a substantial likelihood of success on the merits of his claim that Canon 7B(1)(c) is unconstitutional on its face.

Nor has plaintiff domonstrated that irreparable injury will occur to his interests should the court decline to issue a preliminary injunction since plaintiff has not persuaded the Court that Canon 7B(1)(c) prohibits the statements which plaintiff has expressed a desire to make in the upcoming election.

Finally, the state has a compelling interest, as explained above, in preventing the occurrence of the kind of conduct to which Canon 7B(1)(c) is addressed, and the public would suffer great injury should the enforcement of the Canon be enjoined.

Therefore, plaintiff's motion for a preliminary injunction is DENIED.

(Cite as 598 F.Supp. 69 (1984))

A55

AKRON BEACON JOURNAL

Sunday, September 23, 1984

Editorials

The Ohio Supreme Court and open public debate

OF COURSE the Ohio Supreme Court has the right to regulate the activities of judicial candidates in Ohio, as a federal judge affirmed the other day.

But what neither the Supreme Court nor its representatives have the right to do is to gag judicial candidates. They cannot be neutered and silenced by judicial fiat. A federal judge, Robert M. Duncan, of Columbus, made that clear last week in his ruling that there may be public criticism of judicial candidates so long as it is based on fact.

Judge Duncan's ruling this supports freedom of expression, open politics and open debate about the courts of Ohio. It was also an embarrassing but proper slap at the dictatorial ways of the current Ohio Supreme Court.

That court, headed by Chief Justice Frank Celebrezze, has given increasing appearance of being both partisan and vindictive in its exercise of administrative power. Its apparent attempts to muzzle critics of its procedures and opponents of its political friends were only the latest abuses.

Those who have questioned the Celebrezze court's actions - especially lawyers who are subject to the court's authority - have found themselves subjected to unusual dictates. The court has, for scant reason, stripped the Ohio Bar Association of long-accepted roles in Ohio legal activities.

Questions about such actions, or of the actions of those seen as political allies of the chief justice, have brought the threat of official sanctions. A prosecutor, for example, is under investigation and potentially damaging discipline for criticizing the rulings of a judge who is a candidate for the Supreme Court, a Democratic candidate like the

Celebrezze court's ruling majority.

Concern expressed by the Ohio Bar Association about the direction of the Celebrezze court has brought the description of the lawyers' organization by the court's official spokesman as being "skunks" and liars. That clearly was one of the least judicially-tempered comments made by any state supreme court in some years.

Judge Duncan's ruling was, in effect, a warning to Ohio's highest court that even it can go too far, and that even it can be subjected to a higher authority. Such a warning, given the drift of this court, has come none too soon.

OHIO'S CODE OF JUDICIAL CONDUCT

Canon 7(C)(9):

C. Campaign Guidelines. No incumbent judge or candidate for judicial office during the course of any campaign for nomination or election to judicial office, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall purposely do any of the following:

(9) Post, publish, circulate, or distribute a written or printed false statement, either knowing the same to be false or with reckless disregard of whether it was false or not, concerning a candidate that is designed to promote the election, nomination, or defeat of the candidate.

OHIO'S CODE OF PROFESSIONAL RESPONSIBILITY

Disciplinary Rule 8-102(A)and(B):

DR 8-102. Statements Concerning Judges and Other Adjudicatory Officers

(A) A lawyer shall not knowingly make false staements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

Supreme Court, U.S.
FILED
MAY 17
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1716

In The Supreme Court of the United States

October Term, 1988

SANFORD J. BERGER,

Petitioner,

v.

THE SUPREME COURT OF OHIO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a canon of judicial conduct that permits a candidate for judicial office to conduct a truthful, vigorous and upright campaign, provided he makes no pledges or promises concerning the disposition of issues he may ultimately be called upon to decide, violate that candidate's rights under the First Amendment or the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

2. Is a plaintiff who has judgment entered against him entitled to a full evidentiary hearing in order to determine whether he is a prevailing party pursuant to 42 U.S.C. § 1988?

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No. 88-1716

In The
Supreme Court of the United States

October Term, 1988

SANFORD J. BERGER,

Petitioner,

v.

THE SUPREME COURT OF OHIO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

Petitioner attempts to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The relevant judgment of the court below was rendered on October 31, 1988.

STATEMENT OF THE CASE

In 1984, Petitioner ("Petitioner" or "Berger") was a candidate for the office of Judge of the Cuyahoga County, Ohio, Court of Common Pleas, Division of Domestic Relations. As part of his campaign, Petitioner wished to publicly criticize the administration of the domestic relations court. It was Petitioner's perception, however, that such comments were prohibited by Canon 7(B)(1)(c) of the Ohio

Code of Judicial Conduct ("7(B)(1)(c)").[1] Petitioner maintained this misperception concerning the coverage of 7(B)(1)(c) despite the absence of any indication that Respondent Supreme Court of Ohio or its individual justices interpreted 7(B)(1)(c) in a fashion that would put Petitioner at risk for making any of the statements contemplated.

Despite the absence of any threat of prosecution, Petitioner initiated suit in the United States District Court for the Southern District of Ohio, Eastern Division, seeking assurances from the district court that he could speak his mind without reprisal. The district court, reviewing this case initially on Petitioner's motion for preliminary injunction and again on Respondents' motion for summary judgment, entered judgment for Respondents, holding that Petitioner's fears were unfounded and that there was no evidence that the Supreme Court of Ohio either interpreted 7(B)(1)(c) in an overly expansive and illegal manner or sought to enforce it in any way, legal or otherwise, against Petitioner for his announced course of conduct.

The United States Court of Appeals for the Sixth Circuit, in an unpublished per curiam opinion, affirmed the judgment of the district court on October 31, 1988. Subsequent to the Sixth Circuit's judgment, Petitioner filed a petition for rehearing en banc, which was denied on January 24, 1989. Petitioner's petition for writ of certiorari was docketed with this Court on April 8, 1989.

---

[1] 1 Canon 7(B)(1)(c) states:

(1) A candidate, including an incumbent judge, for a judicial office:

* * *

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

ARGUMENT

I. PETITIONER CANNOT SATISFY THE REQUIREMENTS FOR PLENARY REVIEW.

A. The Petition For Writ Of Certiorari Is Untimely

On page 8 of Berger's petition for writ of certiorari, he acknowledges that subsequent to the Sixth Circuit's judgment in this case, he "filed a Petition for Rehearing En Banc. . . ." *See also* cover page and first page of text of Plaintiff-Appellant Sanford Berger's Petition for Rehearing *En Banc* Containing Suggestions for Rehearing *En Banc*. (A-1-2). Pursuant to Rule 20.2 of the Rules of the Supreme Court of the United States and 28 U.S.C. § 2801(c), Berger had ninety days from October 31, 1988, the date of the Sixth Circuit's judgment, in which to file his petition for writ of certiorari. Ninety days from October 31, 1988, was January 29, 1989. Consequently, unless Berger can identify a tolling provision in this Court's rules, his petition was filed too late and cannot be received by the Clerk.

The only tolling provision in this Court's rules is found in Rule 20.4, which provides, that

> [t]he time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a *petition for rehearing* is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

(Emphasis added.) Thus, Berger could suspend the deadline for filing his petition for writ of certiorari only by filing with

the Sixth Circuit a petition for rehearing. He did *not* do so. Rather, he filed a petition for rehearing *en banc*, which does not satisfy the requirement for Rule 20.4. Berger's petition for writ of certiorari, therefore, is "jurisdictionally out of time" and must not be accepted by the Clerk. Rule 20.3.

B. This Case is Moot.

Berger was a candidate for judicial office in 1984. At the time, there was no attempt whatsoever to discipline him under Cannon 7(B)(1)(c). Moreover, the decisions of the lower courts make it clear that the type of criticism of Ohio's courts that Berger intended to lodge was not prohibited by the Code of Judicial Conduct. Finally, Berger has taken no action to indicate that he plans to run again for judicial office.[2] Any decision rendered by this Court, therefore, would be purely advisory in nature. Thus, the fact that this case is moot makes plenary review inappropriate.

C. The Sixth Circuit's Decision Is Not In Conflict With Any Decisions Issued By Other Circuits Or This Court.

Petitioner has not identified a single court of appeals other than the Sixth Circuit that has addressed the issue of the disciplining of judicial candidates, nor has Petitioner pointed to any decision of the Court that addresses the narrow question presented herein. Consequently, there is no reason for the Court to utilize this case as a vehicle for ensuring jurisprudential uniformity or fairness.

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[2] Berger's inaction in respect to again seeking office demonstrates that there is no "reasonable expectation that . . . [he] would be subjected to the same [state] action again." *Meyer v. Grant*, ____ U.S. ____, 108 S. Ct. 1886, 1890 n. 2 (1988). (Citations omitted.) Consequently, the doctrine of "capable of repetition, yet evading review," is inapplicable to this case. Of course, the fact that the Supreme Court of Ohio never has interpreted Canon 7(B)(1)(c) in a manner that poses any threat to Berger or similarly situated persons renders it even less likely that a controversy will arise in the future between the parties.

Not only is this case of little importance to the nation as a whole, but its impact in the Sixth Circuit will be limited because it was an *unpublished* per curiam opinion. As a result, it will enjoy limited notoriety and application even within that circuit. *See* Rule 24(B) of the Rules of the United States Court of Appeals for the Sixth Circuit ("citation of unpublished decisions . . . is disfavored"). Thus, exercise of this court's plenary review is clearly unwarranted.

D. Neither Petitioner Nor Any Other Candidate For Judicial Office Ever Has Been Disciplined By The Supreme Court of Ohio For Violating Canon 7(B)(1)(c).

Petitioner has not pointed to a single instance in which he or any other candidate for judicial office in Ohio has been disciplined for remarks made during the course of an election campaign. There is absolutely no evidence that the Supreme Court of Ohio would apply Canon 7(B)(1)(c) in an unconstitutional fashion. Petitioner's unfounded speculations alone should not provide sufficient justification for the exercise of this court's jurisdiction.

II. THE SIXTH CIRCUIT'S JUDGMENT UPHOLDING THE LEGALITY OF CANON 7(B)(1)(C) IS CORRECT.

The Court has noted that if the construction of a statute

> is fairly possible by which [a serious doubt of constitutionality] may be avoided, . . . a court should adopt that construction. In particular, this court has been willing to assume . . . [legislative] solicitude for fair procedure, absent explicit statutory language to the contrary.

Califano v. Yamasaki, 442 U.S. 682, 693 (1979). (Citations omitted.) Thus, state legislation carries a strong presumption of constitutionality. *See, e.g., McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809 (1969). In particular, legislation "which has not been authoritatively

construed by a state court should be construed in a manner which will avoid . . . constitutional questions." *Dale Baker Oldsmobile, Inc. v. Fiat Motors of North America, Inc.*, 794 F.2d 213, 221 (6th Cir. 1986) (citing *New York v. Ferber*, 458 U.S. 747 (1982)).

First, it is important to note what behavior is *not* prohibited by Canon 7(B)(1)(c). It does not prevent a candidate for judicial office from announcing his views on administrative or procedural reform of the courts. *See Matter of Riley*, 691 P.2d 695 (Ariz. 1984); *In re Inquiry Relating to Baker*, 218 Kan. 209, 542 P.2d 701 (1975). It does not prevent honest criticism of opponents, *id.*, and it does not inhibit a candidate's ability to conduct an effective campaign for office. These were the very activities in which Petitioner intended to engage.

On the other hand, a candidate for judge may not make promises or pledges as to how he will decide certain cases or promise more favorable treatment to certain citizens at the expense of their fellows. Such promises or pledges are not made in connection with a judge's faithful and impartial performance in office. Indeed, they are so antithetical to the concept of justice that the state has a compelling interest in prohibiting their publication. *See Morial v. Judiciary Commission of the State of Louisiana*, 565 F.2d 295, 302 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978). It makes no difference that the candidate making such promises is sincere about keeping them. It is the very pledge itself, regardless of whether it is true or not, that is anathema to a free society.

Finally, it goes without saying that

> judges are frequently called to adjudicate cases squarely presenting social and political issues, and the state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest or person is entitled to the greatest respect.

Berger v. The Supreme Court of Ohio, et al., Case No. C-2-84-1227, slip op. at 4 (S.D. Ohio Aug. 3, 1987) (citing *Morial v. Judiciary Commission of the State of Louisiana*, 565 F.2d 295, 306 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).[3] Because Canon 7(B)(1)(c) permits every judicial candidate to run "a truthful, upright and vigorous campaign," *Berger v. The Supreme Court of Ohio, et al.*, Case No. 87-3935, slip op. at 4 (6th Cir. Oct. 31, 1988), precisely the sort of campaign Petitioner ran, it is not unconstitutional on its face nor was it applied in an unconstitutional fashion in this case.

III. PETITIONER, WHO HAD JUDGMENT ENTERED AGAINST HIM, IS NOT ENTITLED TO A FULL EVIDENTIARY HEARING TO DETERMINE WHETHER HE IS A PREVAILING PARTY FOR PURPOSES OF AN AWARD OF ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988.

42 U.S.C. § 1988 provides, in relevant part, that a "prevailing party" in an action predicated on 42 U.S.C. § 1983 may recover "a reasonable attorney's fee as part of the [court] costs." A "prevailing party" is one who "receive[s] at least some relief on the merits of his claim. . . ." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). "[A] favorable judicial statement of law in the course of litigation that *results in judgment against the plaintiff* does not suffice to render him a prevailing party." *Id.* at 763. (Emphasis added.) In the case at bar, the lower courts granted judgment for Respondents, *not* Petitioner. Petitioner received no damages, no injunctive relief, and no declaratory judgment in his favor. There was no settlement on terms favorable to Petitioner. Respondents did not in any way alter their conduct in respect to Petitioner. *See id.* at 761. At best, Petitioner received "a favorable statement of law in an otherwise unfavorable opinion." *Id.*

---

[3] The different role and responsibilities of judges as opposed to legislators clearly justifies Ohio's different treatment of judicial candidates and therefore eliminates any notion that Petitioner's right to equal protection was violated.

at 762. It defies common sense to suggest that under the circumstances, Petitioner is a prevailing party for purposes of an award of attorney's fees under § 1988.

To require a district court to conduct an evidentiary hearing on the question of attorney's fees even after entering judgment against the plaintiff in a § 1983 action would undermine the concept of judicial economy and elevate disputes concerning fee awards at the expense of disputes on the merits. *See Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983) ("request for attorney's fees should not result in a second major litigation"). Moreover, any plaintiff could force a district court to conduct an evidentiary hearing on attorney's fees, even after the court enters judgment for the defendants, simply by exaggerating the scope of legislation and then arguing that the more limiting application given to it by enforcement officials is a direct result of his lawsuit. Because the courts below correctly decided that Petitioner was not a prevailing party and that he was not entitled to an evidentiary hearing on that issue, there is no reason for the Court to grant certiorari in this case.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 15, 1989

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 87-3935

SANFORD J. BERGER
Plaintiff-Appellant

- vs -

THE SUPREME COURT OF OHIO, ET AL.
Defendants-Appellees

PLAINTIFF-APPELLANT SANFORD BERGER'S PETITION FOR REHEARING *EN BANC* CONTAINING SUGGESTIONS FOR REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SANFORD J. BERGER	:	CASE NO. 87-3935
	:	
Plaintiff-Appellant	:	PLAINTIFF-APPELLANT
	:	SANFORD J. BERGER'S
- vs -	:	PETITION FOR REHEARING
	:	EN BANC CONTAINING
THE SUPREME COURT	:	SUGGESTIONS FOR
OF OHIO, ET AL.	:	REHEARING EN BANC
	:	
Defendants-Appellees	:	

Plaintiff-Appellant, Sanford J. Berger, respectfully petitions this Court for a rehearing *en banc* of the panel's October 31, 1988 decision (a copy of which is appended hereto) which affirmed the trial court's judgment.

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment that the panel decision is contrary to the United States Supreme Court cases of *New York Times v. Sullivan*, 379 U.S. 254 (1964); *Brown v. Hartlage*, 456 U.S. 45 (1982) and *Boos v. Barry*, _____ U.S. _____ , 108 S.Ct. 1157 (1988), and that to consideration by the full Court is necessary to secure and maintain conformity therewith.

* * *